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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

FRANCISCO ESPINOZA,

Defendant and Appellant.

B205320

(Los Angeles County
Super. Ct. No. NA071091)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Gary J. Ferrari, Judge. Affirmed as modified.

Landra E. Rosenthal, under appointment by the Court of Appeal, for
Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Scott A.
Taryle and Peggy Z. Huang, Deputy Attorneys General, for Plaintiff and Respondent.

Francisco Espinoza appeals from the judgment entered after a jury convicted him of one count of second degree murder (Pen. Code, § 187, subd. (a)),¹ with true findings of personal and intentional discharge of a firearm causing injury or death (§ 12022.53, subds. (b), (c), (d) & (e)(1)) and of the commission of murder for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)(C)).² Espinoza's sole contention on appeal is the 10-year determinate term imposed for the criminal-street-gang enhancement is unauthorized, and the judgment must be modified to strike the 10-year enhancement. We agree the decision in *People v. Lopez* (2005) 34 Cal.4th 1002 (*Lopez*) supports Espinoza's contention his sentence should be modified. We therefore strike the 10-year enhancement, and affirm the judgment as modified.

FACTUAL AND PROCEDURAL BACKGROUND

We view the evidence in a light most favorable to the judgment. (*Jackson v. Virginia* (1979) 443 U.S. 307, 319 [99 S.Ct. 2781, 61 L.Ed.2d 560]; *People v. Elliot* (2005) 37 Cal.4th 453, 466.) At around midnight on June 9, 2006, Francisco Ruiz was leaving a party in a neighborhood claimed by the Westside Wilmas gang, when a car pulled up from which Espinoza emerged and confronted him. After some words were exchanged, Ruiz began walking away and Espinoza produced a gun. He fired about five shots, and Ruiz fell to the ground. Espinoza placed his knee on Ruiz and the two of them struggled over the gun before Espinoza fled in the car. Ruiz later died in the hospital from sepsis following surgery. Espinoza was an admitted member of the Westside Wilmas gang, but he did not know 29-year-old Ruiz, who belonged to the same gang. Espinoza confessed to shooting, but claimed self-defense and to have believed Ruiz had been challenging the driver of the car. According to expert testimony, even though Ruiz had shot a senior and fellow gang member, the shooting would enhance the reputation of

¹ Statutory references are to the Penal Code.

² It was additionally alleged in the information that Espinoza had committed a serious or violent felony within the meaning of the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). However, the record fails to show whether the People either pursued this special allegation or had it dismissed.

the Westside Wilmas gang, because Ruiz was acting to defend his gang's turf from the rival Eastside Wilmas gang.

Following his conviction, Espinoza was sentenced to an aggregate state prison term of 50 years to life: 15 years to life for second degree murder, enhanced by a term of 25 years to life for the discharge of a firearm, plus a determinate term of 10 years for the criminal-street-gang enhancement under section 186.22, subdivision (b)(1)(C).³

DISCUSSION

Citing *Lopez, supra*, 34 Cal.4th 1002, Espinoza contends the trial court imposed an unauthorized term for the criminal-street-gang enhancement. In that case, the defendant was convicted of committing gang-related first degree murder using a gun. The trial court sentenced him to 25 years to life in state prison for the murder, plus 25 years to life for the firearm-use enhancement, and an additional 10 years for a criminal-street-gang enhancement under section 186.22, subdivision (b)(1)(C). (*Lopez*, at p. 1005.) The California Supreme Court addressed the issue of whether a first degree murder committed for the benefit of a criminal street gang is subject to the 10-year enhancement in section 186.22, subdivision (b)(1)(C) or whether such a murder falls within that subdivision's excepting clause and is governed instead by the 15-year minimum parole eligibility term in section 186.22, subdivision (b)(5) (§ 186.22, subd. (b)(5)). (*Id.* at p. 1006.)

The *Lopez* court examined the plain language of section 186.22 and concluded where a defendant commits a first degree murder, the 15-year minimum parole eligibility term applies, in lieu of the determinate 10-year term for the enhancement. (*Lopez* at p. 1009.) Acknowledging the application of section 186.22, subdivision (b)(5) would have “no practical effect for first degree murderers, who now have a minimum parole eligibility term of 25 years (§ 190, subds. (a), (e)), or for second degree murderers, who now have a minimum parole eligibility term of 15 years (*ibid.*),” the *Lopez* court reasoned

³ Both the abstract of judgment and the applicable minute order reflect the aggregate term of 50 years to life, which was orally imposed.

a true finding under section 186.22, subdivision (b)(5) could, nonetheless, be a factor to be weighed by the Board of Prison Terms in setting a defendant's release date from prison. (*Lopez, supra*, at p. 1009.) In sum, the *Lopez* court determined section 186.22, subdivision (b)(5), rather than section 186.22, subdivision (b)(1)(C), governs gang-related murder sentences (with the possibility of parole), although application of section 186.22, subdivision (b)(5) is essentially unnecessary, amounting to no enhancement at all because section 190 fixes a parole date for murder sentences, which is either equal to or greater than the 15-year minimum parole eligibility term of section 186.22, subdivision (b)(5).

In light of *Lopez*, Espinoza was not subject to the section 186.22, subdivision (b)(1)(C) criminal-street-gang enhancement. The People concede the 10-year term for the enhancement should be stricken, but argue this court should instead impose a minimum term of 15 years for parole eligibility under section 186.22, subdivision (b)(5). However, as in *Lopez*, application of that 15-year minimum parole eligibility term is unnecessary, based on Espinoza's term of 15 years to life for having committed second degree murder, which is already in effect.

DISPOSITION

The sentence is modified to delete the 10-year criminal-street-gang enhancement of section 186.22, subdivision (b)(1)(C). Upon issuance of the remittitur, the superior court clerk is directed to issue an amended abstract of judgment and forward it to the Department of Corrections and Rehabilitation. As modified the judgment is affirmed.

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WOODS, Acting P.J.

We concur:

ZELON, J.

JACKSON, J.